Petition

81-1870

Supreme Court, U.S.
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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

BLUE DIAMOND COAL COMPANY and SCOTIA COAL COMPANY - - - Petitioners

versus

UNITED STATES OF AMERICA - - Respondent

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

WILLIAM E. SCENT
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235
Counsel of Record for Petitioners

ROBERT I. CUSICK, JR.
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235
Counsel for Petitioners

WESTERFIELD-BONTE CO., 618 W. KENTUCKY—P.O. BOX 3251, LOUISVILLE, KY.

QUESTION PRESENTED FOR REVIEW

Whether following an underground coal mine explosion the warrantless and statutorily unauthorized entry into and seizure from mine offices without exigent need of Petitioners'* mining records required by federal statute to be maintained and available for inspection by interested persons was an unreasonable search and seizure requiring suppression of the evidence seized?

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*Parties and Designation of Corporate Relationships. The caption of the case in this Court contains the name of all the parties, and pursuant to Rule 28.1 of the Rules of this Court, Petitioners state that Blue Diamond Coal Company is the parent corporation of Scotia Coal Company, its wholly owned subsidiary. All affiliated corporations are wholly-owned either by Blue Diamond or by a wholly-owned subsidiary of Blue Diamond.

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No._____

IN THE

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October Term, 1981

BLUE DIAMOND COAL COMPANY

and

SCOTIA COAL COMPANY - - - *Petitioners*

v.

UNITED STATES OF AMERICA - - *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners, Blue Diamond Coal Company and Scotia Coal Company, petition this Court for a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (one judge concurring separately with the opinion of the court and one judge dissenting) is reported at 667 F. 2d 510 and is contained in Appendix A hereto [p. 1a]. The memorandum opinion and order of the district court is unreported but is contained in Appendix B hereto [p. 30a].

JURISDICTION

The judgment of the court of appeals was entered on December 17, 1981, and is contained in Appendix C hereto [p. 38a]. A timely petition for rehearing with suggestion for rehearing en banc was denied by Order entered February 8, 1982 [Appendix D, p. 39a]. This Petition is filed within sixty days of February 8, 1982, as required by Supreme Court Rule 20. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Fourth Amendment:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. §801 et seq. (the "Act"),[1] particularly the following portions of that Act:

30 U.S.C. §863(d)(1):

> Within three hours immediately preceding the beginning of any shift, and before any miner in such shift enters the active workings of a coal mine, certified per-

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[1]The Act was amended in 1977 and is now the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §801, *et seq.* However, as the explosion occurred prior to that amendment, the provisions quoted are those in force at that time.

sons designated by the operator of the mine shall examine such workings and any other underground area of the mine designated by the Secretary or his authorized representative. . . . Each such mine examiner shall also record the results of his examination with ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

30 U.S.C. §863(f):

In addition to the pre-shift and daily examination required by this section, examinations for hazardous conditions, including tests for methane, and for compliance with the mandatory health or safety standards, shall be made at least once each week by a certified person. . . . A record of these examinations, tests, and actions taken shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

30 U.S.C. §863(g):

At least once each week, a qualified person shall measure the volume of air entering the main intakes and leaving the main returns. . . . A record of such measurements shall be recorded in ink or indelible pencil in a book approved by the Secretary kept for such purpose in an area on the surface of the coal mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons.

30 U.S.C. §863(w):

> Each day, the mine foreman and each of his assistants shall enter plainly and sign with ink or indelible pencil in a book approved by the Secretary provided for that purpose a report of the condition of the mine or portion thereof under his supervision, which report shall state clearly the location and nature of any hazardous condition observed by him or reported to him during the day and what action was taken to remedy such condition. Such book shall be kept in an area on the surface of the mine chosen by the operator to minimize the danger of destruction by fire or other hazard, and shall be open for inspection by interested persons.

30 U.S.C. §865(g):

> All electric equipment shall be frequently examined, tested and properly maintained by a qualified person to assure safe operating conditions. When a potentially dangerous condition is found on electric equipment, such equipment shall be removed from service until such condition is corrected. A record of such examinations shall be kept and made available to an authorized representative of the Secretary and to the miners in such mine.

30 U.S.C. §813(a):

> Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and

(4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

30 U.S.C. §813(b)(1):

For the purpose of making any inspection or investigation under this chapter, the Secretary or any authorized representative of the Secretary shall have a right of entry to, upon, or through any coal mine.

30 U.S.C. §813(d):

For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpoenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. . . . In case of contumacy or refusal to obey a subpoena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

30 U.S.C. §813(e):

> In the event of any accident occurring in a coal mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal mine where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine.

30 U.S.C. §818:

> The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent (a) violates or fails or refuses to comply with any order or decision issued under this chapter, or (b) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter, or (c) refuses to admit such representatives to the mine, or (d) refuses to permit the inspection of the mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine, or (e) refuses to furnish any information or report requested by the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or (f) refuses to permit access to, and copying of, such records as the Secretary

or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter. Each court shall have jurisdiction to provide such relief as may be appropriate. . . .

STATEMENT OF THE CASE

Around noon on March 9, 1976, an explosion occurred at Scotia Mine #1 at Oven Fork, Letcher County, Kentucky, resulting in the death of fifteen miners. The mine was operated by Petitioner Scotia Coal Company, a wholly-owned subsidiary of Petitioner Blue Diamond Coal Company.

Shortly after the explosion (at approximately 1:00 p.m.), officials of the Mining Enforcement and Safety Administration ("MESA")[2] arrived on the scene and commenced rescue operations in an attempt to recover bodies and to stabilize mine conditions. At approximately 3:15 p.m. on March 9, Bill Clemons, assistant district manager for MESA, arrived at the mine and took charge of the rescue operations.

Clemons gave an order at approximately 9:00 p.m. on March 9 for "someone to confiscate the Fire Boss books" [App. A, p. 4a]. These records were maintained in compliance with the Act, 30 U.S.C. §863(d)(1), (f), (g), (w). Herman Lucas, a MESA inspector, carried out that order by seizing twenty books from the mine office and the electrical shop. The books were placed in a government vehicle and a day or more later were transported to MESA offices in Whitesburg, Kentucky; no examination occurred until at

[2]Under the 1969 Act, MESA was a part of the Department of Interior. Following the 1977 amendment to the Act, MESA became the Mine Safety and Health Administration (MSHA) and responsibility was shifted from the Interior Department to the Department of Labor.

least two days after the seizure. Counsel for Petitioners requested return of the seized records on March 11. The records, said to be somewhere in Pikeville, Kentucky, at that time, were not returned upon demand, and no inventory of the seized records was furnished until several weeks later. The court of appeals stated that it was "undisputed that after the records were seized, no MESA official examined them or intended to do so at any time during the rescue operation which lasted until March 11" [App. A, p. 7a].

In advance of criminal trial,[3] pursuant to Rule 12 of the Federal Rules of Criminal Procedure, Petitioners filed a motion to suppress the records which had been seized by the MESA inspectors. Following an evidentiary hearing, the district court granted the motion to suppress, finding that the records had not been placed in jeopardy as a result of the underground explosion and that their seizure had no relation to the rescue operation. That court concluded that the real reason for seizure of the records was for their later use by the Government as part of its investigation which led to criminal proceedings:

> It stands undisputed that the seizure of the records was not related in any direct manner to the rescue of the missing coal miners. The only conclusion one can draw from the evidence is that the Government sought to preserve evidence for further purposes without making any showing that the records seized were in jeop-

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[3]Criminal proceedings were instituted on June 25, 1979, when a grand jury in the United States District Court for the Eastern District of Kentucky returned an indictment charging Petitioners with four counts of willful violation of a mandatory safety standard under 30 U.S.C. §§819, 863, and 877. Two other counts of the indictment charged the making of false statements in records which the Act required to be maintained, in violation of 30 U.S.C. §819.

> ardy of being destroyed, secreted or misplaced. . . . Had the evidence shown that the documents were examined to assist in determining the status underground prior to the explosion, to identify active working locations or to assist in any way the rescue operation, the seizure would have been permissible because a true exigent circumstance would have existed. . . . Absent such usage and upon evidence that the records were seized to aid in an investigation to follow the rescue operations, it was not impractical to secure a warrant no matter what the distances between Oven Fork, Kentucky and the several available United States Magistrates might have been, for the simple reason that no basis in fact existed justifying deviation from the applicable procedural rules for securing such documents at the time they were seized [App. B, pp. 33a-34a].

The findings of fact made by the district court went substantially unchallenged by the Government before the court of appeals.[4] Nevertheless, the court of appeals reversed and refused to apply the exclusionary rule to a highly-regulated industry by broadly stating that "a businessman in such an industry . . . is said to consent to restrictions placed upon him" [App. A, p. 2a]. That court, while recognizing that a coal mine operator does have an interest in the retention of its records, held that the interest does not merit the protection of the Fourth Amendment.

The appellate court was ambivalent in grappling with the nature of the mine operator's interest in the records and conceded that they did serve multiple purposes of the operator even though they were being maintained pursuant to statute:

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[4]Respondent's appeal from the order of the district court granting the pre-trial motion to suppress was taken pursuant to 18 U.S.C. §3731.

> We cannot agree that these records are of interest or importance only to the government. It is not uncommon for records required by statute to serve multiple purposes. They may be used in the day-to-day operation of the coal mine. It is important for management to know the physical conditions within the mine. The miners also clearly benefit from having the records present at the mine site. Without them, the miner loses the protection afforded by knowing the location of dangerous areas within a mine. The records provide a medium whereby different shifts of miners may communicate with each other concerning mine conditions. The records may also be of use when a dangerous condition or accident increases the peril of mining coal, in locating the cause of the condition, or perhaps in determining its scope, thereby indicating how much of the mine may continue in operation [App. A, pp. 16a-17a].

Judge Engel in delivering the court's opinion acknowledged that "this interest is adversely affected by allowing the warrantless seizure of records from mine offices" [App. A, p. 18a]. However, the fact that the Act required the operator to make the records available for inspection caused the court to hold the mine operator's interest in them to be "substantially diminished." Therefore, despite the flouting by the Government of statutory procedure and of the Fourth Amendment prohibition against unreasonable searches and seizures, the court withheld the protection of the exclusionary rule.

Judge Wiseman's concurring opinion dismissed any right of the mine operator to assert an interest in its records on the theory that, since it maintained them in compliance with statute, it had no legitimate expectation of privacy. The operator's compliance with the statute was con-

strued, in effect, as a waiver of all interest and an implied consent to an illegal seizure.[5]

The dissenting opinion of Judge Keith emphasized that the Act authorized only warrantless inspection of the records—not a resort to "self-help" by federal investigators in seizing records without a warrant or without exigent circumstances. Judge Keith, reasoning that only the warrantless inspection provision of the Act is an exception to the Fourth Amendment, concluded: "The Act does not empower the MESA inspectors to take the records from the mine site. Yet, all parties in this action admit that the MESA agents did precisely what the Act does not authorize them to do" [App. A, p. 28a]. The dissent found the conduct flagrant and the remedy of suppression through the use of the exclusionary rule "mandatory and in accordance with standard search and seizure analysis" [App. A, p. 26a].

REASONS FOR GRANTING THE WRIT

I. The Failure to Recognize a Substantial Interest Under the Fourth Amendment Against the Unauthorized Seizure of Records Maintained By a Business in a Highly Regulated Industry Represents a Significant and Impermissible Departure From the Applicable Decisions of This Court and Presents an Important Question of Federal Law Which Should Be Settled By This Court.

A. A WARRANTLESS SEIZURE IS *PER SE* UNREASONABLE AND UNCONSTITUTIONAL.

The Fourth Amendment to the Constitution of the United States assures the right of the people to be secure from unreasonable searches and seizures. That literal

[5]The Act gives no notice of the possibility of warrantless seizure to support the idea of consent or waiver.

wording has been construed by a long line of cases to hold that warrantless searches and seizures—subject to very narrow exceptions—are unreasonable *per se*. *Marshall* v. *Barlow's Inc.*, 436 U. S. 307, 98 S. Ct. 1816 (1978); *Coolidge* v. *New Hampshire*, 403 U. S. 443, 91 S. Ct. 2022 (1971); *Camara* v. *Municipal Court*, 387 U. S. 523, 87 S. Ct. 1727 (1967); *Mapp* v. *Ohio*, 367 U. S. 643, 81 S. Ct. 1684 (1961). The burden is on the one seeking the benefit of an exception to show the need for it. *Arkansas* v. *Sanders*, 442 U. S. 753, 99 S. Ct. 2586 (1979).

This case involves one of the many highly regulated industries subject by statute to frequent, unannounced, warrantless inspections. The official misconduct of the MESA inspectors in exceeding their authority to enter and inspect by impermissibly entering and seizing the records is precisely the kind of activity from which the Fourth Amendment was intended to provide protection. The potential for official abuse of Fourth Amendment values could be virtually overwhelming in the area of governmental inspections of highly regulated industries if the decision of the court of appeals is allowed to stand.[6]

B. THE SEIZURE OF RECORDS IN THIS CASE CAME WITHIN NO EXCEPTION TO THE WARRANT REQUIREMENT.

1. There Were No Exigent Circumstances.

As the district court held, the MESA inspectors "confiscated" the records without the consent of Petitioners and without a warrant. That court found that the records were

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[6]Counsel understand that MSHA agents executed a warrantless seizure of similar records at Topmost, Kentucky in December, 1981.

not endangered by the explosion as they were located in mine offices on the surface.[7] Nor were they necessary to the MESA officials in their rescue efforts. The district court found that a warrant *could have been obtained* from several available United States magistrates and furthermore that a warrant *should have been obtained* as there were no exigent circumstances to justify the seizure absent a warrant.[8] The court of appeals noted its agreement with the district court that exigent circumstances did not justify the seizure.

2. The Act Does Not Create an Exception to the Warrant Requirement for the Seizure of Records Which Took Place Here.

In concluding that Petitioners' interest in their mining records vis-a-vis the Fourth Amendment was "diminished," the court of appeals erroneously failed to recognize that such interest was "diminished" only insofar as Congress has so provided. The Act authorizes the making of inspections and investigations for the purpose of: [1] obtaining information relating to health and safety conditions and the causes of accidents, diseases, and physical impairments; [2] gathering information with respect to mandatory health and safety standards; [3] determining whether an imminent danger exists; and [4] determining whether there is compliance with mandatory health and safety standards or any

[7]Not only were the records not endangered in any way, but the operator would have been violating the Act by removing them from the property.

[8]Moreover, Rule 41(a) of the Federal Rules of Criminal Procedure also authorizes a search warrant to be issued by a judge of a state court of record within the district wherein the property is located upon request of a federal law enforcement officer or an attorney for the Government.

order, notice, or decision issued under the Act. 30 U.S.C. §813(a). For purposes of making any inspection or investigation, the Act confers "a right of entry to, upon, or through" any mine. 30 U.S.C. §813(b). Section 813 provides that no advance notice is to be given in carrying out purposes [3] and [4]; this provision has been construed to limit the situations in which no notice is required. *Marshall* v. *Texoline Co.*, 612 F. 2d 935 (5th Cir. 1980); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F. 2d 589 (3rd Cir. 1979), *cert. den.*, 444 U. S. 1015, 100 S. Ct. 665 (1980).

The records seized were maintained in compliance with the Act. Mine operators are required to keep books on the surface of the mine in which mine personnel record the results of all mine examinations. The Act provides that the record books "shall be open for inspection by interested persons." 30 U.S.C. §863(d)(1), (f), (g), (w). *See also* 30 U.S.C. §865(g).

30 U.S.C. §818 authorizes the Secretary of Labor to institute a civil action to obtain appropriate injunctive relief in the event that a mine operator refuses to permit access to or copying of records. Additionally, §813(d) empowers the Secretary to issue a subpoena to compel the production of documents for the purpose of investigating mine accidents. Section 813(e) imposes upon the operator the duty to take appropriate measures to prevent destruction of evidence in the event of an accident.

Thus, the Act does not authorize "self help" on the part of government officials by way of warrantless seizure of any mine records. Quite to the contrary, the very inclusion in the statute of procedural means of compelling cooperation on the part of mine owners is a clear indicator that the method of "confiscation" that occurred in this case was

neither contemplated nor sanctioned by the Act. In fact, in an earlier decision, *United States* v. *Consolidation Coal Co.*, 560 F. 2d 214 (6th Cir. 1977), *vacated and remanded*, 436 U. S. 942, 98 S. Ct. 2841 (1978), *judgment reinstated*, 579 F. 2d 1011 (6th Cir. 1978), *cert. den.*, 439 U. S. 1069, 99 S. Ct. 836 (1979), the Sixth Circuit had held that the Act does not authorize seizure of records:

> In addition, nothing in the Act authorizes the wholesale seizure of records which took place here. Even where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course, no precedent sanctions direct access to the records without demand in the absence of a search warrant. 560 F. 2d at 217.

The issue thus narrows to a consideration of what the Act implies on the part of mine operators. Since warrantless *inspections* are authorized, consent to these inspections is implied or imposed upon the operators. However, authority for others to take custody of or to retain these records is nowhere provided in the Act. The Act instead provides procedural prerequisites for obtaining physical control of the records. There is, therefore, *no logical leap* that can be made from the concept of consent to an authorized inspection to that of consent to an unauthorized seizure. The dissenting opinion of the court of appeals correctly recognized the seizure as a violation of the Act and, hence, of the Fourth Amendment:

> This consent is merely a legal fiction imposed on the mining industry. The fictionalized consent in effect, and in reality, waives Fourth Amendment rights guaranteed in the text of the Constitution. *The waiver or consent imposed by the Act, however, is a limited one.* Mine operators, such as Blue Diamond, *have only con-*

> *sented constructively to inspections and searches conducted in accordance with the Act.* "[C]onsent searches are *reasonable only if kept within the bounds of the actual consent.*" *United States* v. *Griffin*, 530 F. 2d 739, 744 (7th Cir. 1976). *See, e.g., Mason* v. *Pulliam*, 557 F. 2d 426, 429 (5th Cir. 1977) ("when the basis for search or seizure is consent, the *government must conform to the limitations placed upon the right granted to search, seize or retain the papers or effects.*"); *Oliver* v. *Bowens*, 386 F. 2d 688, 690 (9th Cir. 1967); *United States* v. *Dichiarinte*, 445 F. 2d 126, 129 (7th Cir. 1971). *Searches which exceed the scope of consent violate the Fourth Amendment. Id.* (emphasis added.) [App. A, pp. 27a-28a].

In minimizing the nature of the interest of the mine operator in its business records for Fourth Amendment purposes, the court of appeals misinterpreted this Court's decisions in *Donovan* v. *Dewey*, ___ U. S. ___, 101 S. Ct. 2534 (1981); *Rakas* v. *Illinois*, 439 U. S. 128, 99 S. Ct. 421 (1978), *rehearing denied*, 439 U. S. 1122, 99 S. Ct. 1035 (1979); and *United States* v. *Salvucci*, 448 U. S. 83, 100 S. Ct. 2547 (1980).

Donovan teaches that the mine operator's Fourth Amendment interests are limited *only* to the extent provided by the Act. In *Donovan*, the Court's justification for upholding the provisions of the Act authorizing warrantless administrative inspections was based on the existence of the very factors which are missing here.

First, the Court made clear that the reasonableness of warrantless administrative action would depend on the specific enforcement needs and privacy guarantees of each statute. Thus, a warrant may not be required when Congress has reasonably determined warrantless searches are necessary to further a regulatory scheme. But inspections

will be unreasonable if not authorized by law or if unnecessary to further federal interests. The court in *Donovan* noted that the Act specifically defined the purpose, nature, and frequency of the inspections.

Here, no provision of the Act authorized the entry by the MESA inspectors to seize the mining records. The Act authorizes *warrantless inspection only* — not seizure. It contemplates that the operator *may refuse* a governmental intrusion by providing the mechanism of requiring institution of a civil action. The Act envisions that records will be physically obtained only by subpoena as part of a public hearing. The right to enter mine offices, seize business records, and remove them from the premises is nowhere created by the Act or stated as necessary to further any legitimate federal purpose. Clearly, Petitioners had a reasonable expectation of freedom from the type of unauthorized governmental intrusion which occurred here.

Second, *Donovan* emphasized that the federal regulatory presence may be sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes. The Court carefully pointed out that an operator knew from the Act and regulations the purpose and limits of the governmental intrusion.

Here, since the actions of the MESA inspectors were not authorized by the Act, Petitioners had no way of knowing that their property would be subject to the type of governmental intrusion which occurred. Moreover, since the Act does not authorize seizure of records, the likelihood of abuses of "unbridled discretion" of executive and administrative officers is great. [App. A, p. 16a] This is in con-

trast with those narrowly drawn provisions of the Act authorizing warrantless administrative inspections which place limitations upon the purpose for which inspections may be made. *See Marshall* v. *Barlow's Inc.*, 436 U. S. 307, 98 S. Ct. 1816 (1978); *Marshall* v. *Texoline Co.*, 612 F. 2d 935 (5th Cir. 1980); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F. 2d 589 (3rd Cir. 1979), *cert. den.*, 444 U. S. 1015, 100 S. Ct. 665 (1980). Here, the discretion of MESA inspectors as to the scope and purposes of their seizure activities is not directly curtailed by the regulatory scheme but is in fact unlimited.

Third, *Donovan* emphasized that section 818 of the Act contained a specific mechanism for accommodating any privacy concerns. *See also Marshall* v. *Sink*, 614 F. 2d 37 (4th Cir. 1980); *Marshall* v. *Texoline Co.*, 612 F. 2d 935 (5th Cir. 1980); *Marshall* v. *Nolichuckey Sand Co., Inc.*, 606 F. 2d 693 (6th Cir. 1979), *cert. denied*, 446 U. S. 908, 100 S. Ct. 1835 (1980); *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F. 2d 589 (3rd Cir. 1979), *cert. den.*, 444 U. S. 1015, 100 S. Ct. 665 (1980). This section protects Fourth Amendment guarantees in that the mine operator is allowed to present its objections in a district court before an intrusion takes place. Petitioners had no meaningful opportunity to refuse entry and seizure or to exercise their rights under section 818. The MESA inspector simply entered, located the records, took them, and announced that they were confiscated.

The court of appeals also erroneously interpreted *Rakas* v. *Illinois*, 439 U. S. 128, 99 S. Ct. 421 (1978), *rehearing denied*, 439 U. S. 1122, 99 S. Ct. 1035 (1979) and *United States* v. *Salvucci*, 448 U. S. 83, 100 S. Ct. 2547 (1980), when it reasoned that the mine operator's interest is more

akin to a property or possessory interest which is not necessarily sufficient to create a legitimate expectation of privacy. According to *Rakas*, although expectations of privacy need not be based on a common law interest in property, one who owns or lawfully controls property will in all likelihood have a legitimate expectation of privacy.

As the owner and lawful possessor of private commercial property and business records, the operator certainly has a sufficient interest to give rise to a reasonable expectation of security against the governmental intrusion which occurred here. Additionally, as the court of appeals recognized, that interest was not limited simply to a property or possessory interest. The operator had a reasonable expectation that it would not be deprived of the use of its records in conducting its mining operation; the seized record books were to be examined and used by mining personnel on a daily basis in order to insure safe working conditions.[9] The results of required examinations and tests are to be recorded in a book kept in an area on the surface of the mine chosen by the operator to minimize the danger of destruction. *See, e.g.*, 30 U.S.C. §863(d)(1), (f), (g), (w), §877(g), (p). Moreover, 30 U.S.C. §813(e) provides that in the event of an accident, the operator is to take appropriate measures to prevent destruction of any evidence. 30 U.S.C. §821(a) requires the operator to investigate all accidents, thereby demonstrating a further basis for the operator's expectation of security against the type of intrusion which occurred here.

United States v. *Salvucci*, 448 U. S. 83, 100 S. Ct. 2547 (1980), was decided under entirely different circumstances than those which exist here. In the context of a crime of

[9]Continued operation of a mine without these records could be dangerous.

possession of stolen mail, this Court held that the inquiry was not merely whether Salvucci had a possessory interest in the items seized but was whether he had an expectation of privacy in the area searched. One can hardly expect the mere possession of contraband of itself to give rise to a protectible privacy interest; so the inquiry in *Salvucci* naturally tended to focus on the area searched. Here, possession of the records seized was required by law rather than forbidden.

The basic purpose of the Fourth Amendment is to safeguard privacy and security "against arbitrary invasion by government officials." *Camara* v. *Municipal Court*, 387 U. S. 523, 87 S. Ct. 1727 (1967). *See Marshall* v. *Barlow's Inc.*, 436 U. S. 307, 98 S. Ct. 1816 (1978). A reasonable expectation of privacy thus is nothing more than a *reasonable expectation of freedom from arbitrary governmental intrusion.* Here, although the Act authorizes a limited intrusion as to the subject records, MESA agents went beyond the Fourth Amendment and beyond the more expansive activity permitted by the Act and arbitrarily invented another kind of intrusion which is countenanced nowhere except in the opinion of the court of appeals. This Court should determine whether Fourth Amendment values will tolerate such an intrusion.

II. Abrogation of Use of the Exclusionary Rule to Redress Fourth Amendment Violations as Applied to Highly Regulated Industries Is an Important Question of First Impression Which Should Be Decided By This Court.

It normally follows from a violation of Fourth Amendment rights that evidence illegally obtained as a result must be suppressed. *Rakas* v. *Illinois*, 439 U. S. 128, 99 S. Ct. 421 (1978), *rehearing denied*, 439 U. S. 1122, 99 S. Ct. 1035

(1979). Various purposes have been stated as being served by application of the exclusionary rule. It has been said that, by removing the incentive for disregarding the Fourth Amendment, the courts intended to compel respect for the constitutional guarantee. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 91 S. Ct. 2022 (1971). The decisions of this Court often have referred to "the imperative of judicial integrity" in applying the exclusionary rule. *See Stone* v. *Powell,* 428 U. S. 465, 96 S. Ct. 3037 (1976). Recent decisions of this Court have held the primary purpose of the exclusionary rule to be deterrence of unlawful governmental action. *See Michigan* v. *DeFillippo,* 443 U. S. 31, 99 S. Ct. 2627 (1979). As stated in *Stone* v. *Powell, supra,* the exclusionary rule is based on the theory that the effect of exclusion will be to discourage law enforcement officials from violating the Fourth Amendment and to demonstrate that society attaches serious consequences to violation of constitutional rights so as to encourage those who formulate and implement law enforcement policies to incorporate Fourth Amendment ideals into their value systems.

The court of appeals admitted that the mine operators had an interest — indeed several — in retention of their records and that the manner in which they were seized violated Fourth Amendment requirements:

> This panoply of interests leads us to conclude that *it was not proper for the mine inspector to have removed the records* in the absence of specific consent or administrative warrant authorizing such action [App. A, p. 19a (emphasis added)].

However, the court disregarded that violation and determined almost by judicial fiat rather than by precedent that it should depart from constitutional standards and

withhold the protection of the Fourth Amendment in this case. It declared the mine operator's interest in its records to be unworthy of protection merely because its business was regulated by statute: "We do not feel, however, that the operator's interest in the records requires their suppression, particularly in light of the statutory regulation which applies to the coal mining industry" [App A, p. 19a].

As previously indicated, Petitioners had a substantial interest in their mining records and certainly one sufficient under *Rakas* and *Donovan* to be entitled to Fourth Amendment protection. However, having found a violation of the Fourth Amendment, the court placed improper emphasis on the nature of the interest violated while disregarding the primary focus and purpose of the exclusionary rule, namely, *the deterrence of official misconduct.*

The decision of the court of appeals would, in effect, revoke the exclusionary rule as to any highly regulated industry and would tolerate official misconduct that flies in the face of both the Fourth Amendment and the procedures set forth by the statute regulating the industry. While the opinion of the court of appeals did not address the possible impact of its decision on future investigatorial improprieties, the concurring opinion seemed well aware of the deleterious effects likely to be produced and lamely attempted to minimize their significance: "Government agents who might view the Court's holding as general authority for random seizures of personal property that might be susceptible to warrantless inspections do so at their own peril" [App. A, p. 22a].

That *caveat* implies that, while the court will not sanction a violation of Fourth Amendment rights, it will no longer impose any reprisal or deterrence for the miscon-

duct. Government agents are exhorted to police themselves and encouraged not to run amuck with their newly-found discretion which is neither tolerated by the spirit and language of the Fourth Amendment nor by any statutory exception to the Fourth Amendment.

The result reached by the court of appeals is to be contrasted with the approach followed in *United States* v. *Pugh*, 417 F. Supp. 1019 (W.D. Mich. 1976). That case involved the highly regulated drug industry. In *Pugh*, agents entered defendant's pharmacy and seized a quantity of prescriptions without a warrant. They purported to be acting pursuant to a statute which created an exception to the warrant requirement permitting seizure "in any other situations where a warrant would not be constitutionally required." The court held that the warrantless seizure of the prescriptions did not fit into that statute's specifically enumerated exceptions to the warrant requirement nor were there any other circumstances to constitute any of the established exceptions to the warrant requirement. Since the statute did not authorize the warrantless seizure, the Fourth Amendment was violated, and suppression of the illegally seized materials was ordered. *Pugh*, *supra*.

The court of appeals decision represents a sharp departure from the traditional application of the Fourth Amendment and is based on no exception to the exclusionary rule announced to-date by this Court. The decision is certain to have grave impact on all highly regulated industries. Whether use of the exclusionary rule to redress Fourth Amendment violations should be abrogated with respect to highly regulated industries is a question which should be considered by this Court, particularly since none

of the limitations placed upon the exclusionary rule by this Court applies to the circumstances of this case.

This Court in certain specifically defined circumstances has limited application of the exclusionary rule. *Rakas* v. *Illinois*, 439 U. S. 128, 99 S. Ct. 421 (1978), *rehearing denied*, 439 U. S. 1122, 99 S. Ct. 1035 (1979), denied standing to passengers in a car to assert a violation of the Fourth Amendment where they asserted neither a property nor a possessory interest in the automobile nor an interest in the property seized. *Michigan* v. *DeFillippo*, 443 U. S. 31, 99 S. Ct. 2627 (1979), refused to suppress evidence which was seized as a result of a lawful arrest and search made in good faith reliance on an ordinance subsequently determined to be unconstitutional. *United States* v. *Calandra*, 414 U. S. 338, 94 S. Ct. 613 (1974), held that a witness before the grand jury may not refuse to answer questions on the ground they are based on evidence unlawfully obtained.

This Court also withheld application of the exclusionary rule in *United States* v. *Janis*, 428 U. S. 433, 96 S. Ct. 3021 (1976). There, evidence seized by a state law enforcement officer in good faith reliance on a search warrant later discovered to be defective was not excluded in a federal civil tax proceeding. *Stone* v. *Powell*, 428 U. S. 465, 96 S. Ct. 3037 (1976), held that the use of illegally seized evidence at trial would not be reconsidered on a state prisoner's federal *habeas corpus* petition where he was afforded an opportunity for full and fair litigation of that claim in state court. *United States* v. *Havens*, 446 U. S. 620, 100 S. Ct. 1912 (1980), *rehearing denied*, 448 U. S. 911, 101 S. Ct. 25 (1980), upheld the use of illegally seized evidence to impeach a defendant's false testimony given on direct examination or in response to proper cross-examination.

In *Michigan* v. *Tucker*, 417 U. S. 433, 94 S. Ct. 2357 (1974), the Court held that a witness's testimony need not be excluded because the witness's identity was learned as a result of questioning in violation of the *subsequently* imposed *Miranda* standards. In this context, the Court noted that the deterrent purpose of the exclusionary rule assumes that police have engaged in willful or at least negligent conduct which has deprived the defendant of some right and that where official action was pursued in complete good faith, the deterrence rationale loses much of its force. *See* Justice White's dissenting opinion in *Stone* v. *Powell*, 428 U. S. 465, 96 S. Ct. 3037 (1976), proposing that the exclusionary rule should not be applied where the evidence was seized by an officer acting in the good faith belief that his conduct comported with existing law and where he had reasonable grounds for that belief. A recent modification of the exclusionary rule was announced in *United States* v. *Williams*, 622 F. 2d 830 (5th Cir. 1980), *cert. denied*, 449 U. S. 1127, 101 S. Ct. 946 (1981), where the court held that the fact that an agent had committed a good faith or technical violation would not require application of the exclusionary rule to suppress evidence improperly seized.

Suffice it to say that the circumstances present in these cases are completely missing here. In the district court, the Government relied primarily upon attempting to establish the existence of exigent circumstances to justify the warrantless seizure. It made no real effort to prove circumstances warranting disregard of the exclusionary rule if a Fourth Amendment violation was established. Nor did the court of appeals rely upon the existence of any of the foregoing circumstances to justify its refusal to apply the exclusionary rule. It instead coined a new and unprecedented limitation on application of the exclusionary

rule. If this newly-created limitation is to be applied to highly regulated industries, its application should occur only after thorough review by this Court.

Moreover, if the purpose of the exclusionary rule is to deter official misconduct, then the judgment of the court of appeals is manifestly wrong. The order was given "to confiscate" the records, a graphic term that accurately describes the intent underlying the order and the deliberate misconduct of ignoring the Fourth Amendment and the Act. No attempt was made to secure a warrant. No provision of the Act authorized the entry, seizure, and removal of the records from the premises. The Act in fact indicates that Congress intended to preclude resort to self-help or forcible action.

The business records were removed from the premises entirely, and MESA inspectors even refused to provide an inventory until several weeks later. The MESA inspectors did not examine the records or intend to do so at the time of the rescue operation. The seizure was not part of a routine administrative inspection but was in anticipation of a subsequent investigation which obviously could have and did have criminal consequences. There were no exigent circumstances to justify the seizure. Under these circumstances, invocation of the exclusionary rule would operate to further the primary purpose of deterrence of official misconduct. Therefore, application of the exclusionary rule should be mandatory in this case.

CONCLUSION

For all of the reasons set forth herein, the petition for a writ of certiorari should be granted and the judgment of the Court of Appeals for the Sixth Circuit reversed.

Respectfully submitted,

WILLIAM E. SCENT
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235
Counsel of Record for Petitioners

ROBERT I. CUSICK, JR.
WYATT, TARRANT & COMBS
Citizens Plaza
Louisville, Kentucky 40202
(502) 589-5235
Counsel for Petitioners

Appendix

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 80-5084

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant*

v.

BLUE DIAMOND COAL COMPANY;
SCOTIA COAL COMPANY, - - - *Defendants-Appellees*

Appeal From the United States District Court for the Eastern District of Kentucky

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OPINION—Decided and Filed December 17, 1981

Before: ENGEL and KEITH, Circuit Judges and WISEMAN, District Judge.*

ENGEL, Circuit Judge, delivered the opinion of the Court; WISEMAN, District Judge (pp. 20-23), delivered a separate concurring opinion; KEITH, Circuit Judge pp. 24-27), delivered a dissenting opinion.

ENGEL, Circuit Judge. In this appeal we are required to consider whether the Fourth Amendment protection against unreasonable searches and seizures extends to the warrantless seizure of statutorily required records from the office of a coal mine company where they were located on a table and open to inspection.

We reverse the district court judgment suppressing the records and directing their return to the coal mine opera-

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*Hon. Thomas A. Wiseman, Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

tor.[1] In so doing, we recognize that the mine industry is a highly regulated one and that a businessman in such an industry, in accepting the burdens as well as the benefits of the trade, is said to consent to restrictions placed upon him. *Marshall* v. *Barlow's*, 436 U. S. 307, 313 (1978); *Almeida-Sanchez* v. *United States*, 413 U. S. 266, 271 (1973). Although the coal mine operator has an interest in the retention of the records, we find that it does not rise to a Fourth Amendment interest which requires their suppression.

I.

Shortly before noon on March 9, 1976, an underground explosion occurred within the Imboden seam of the Scotia Coal Mine, located in Letcher County, Kentucky. Officials of the Mine Enforcement and Safety Administration[2] (MESA) began to arrive at the mine premises in the early afternoon to coordinate the rescue efforts for fifteen coal miners who were trapped underground. The Scotia Mine was owned and operated by appellee Scotia Coal Company and by its parent company, appellee Blue Diamond Coal Company.

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[1]The government has authority to appeal a suppression order if the defendant has not been put in jeopardy and the U. S. Attorney certifies the appeal is not taken for purposes of delay and the evidence provides substantial proof of a material fact. 18 U.S.C. § 3731.

[2]The accident occurred when the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801, *et seq.*, was in force. The new act, the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, *et seq.* (Supp. I 1977) [hereafter 1977 Act], shifted responsibility from the Interior Department to the Department of Labor. The current name of the regulatory agency has been changed to Mine Safety and Health Administration (MSHA). We refer to provisions of the 1969 Act in force at the time of the accident except where noted otherwise.

At approximately 3:00 P.M. that afternoon, Bill Clemons, an assistant district manager for MESA, arrived at the mine and assumed control of the rescue and recovery operations. Approximately 9:00 P.M., while the coal miners were still trapped underground, Clemons ordered a subordinate to confiscate records which the mining company was required to maintain under the Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 863. Among the records required to be kept under the Act were tests for the methane content of the air at underground locations within the coal mines. A belief that methane concentration, a frequent cause of ignition within coal mines,[3] had not been

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[3]The legislative history of the 1969 Act reflects congressional concern for the danger of explosions resulting from ignition of undetected accumulation of methane in coal mines:

> The most hazardous condition that can exist in a coal mine, and lead to disaster-type accidents, is the accumulation of methane gas in explosive amounts. Methane can be ignited with relatively little energy and there are, even under the best mining conditions, numerous potential ignition sources always present. . . . Men working in the face areas where coal is mined and where fresh methane can be emitted in large volumes due to the disturbance of the coal bed, are required to take numerous safety precautions to insure that methane is not present in explosive amounts. All equipment inby the last open crosscut must be of a permissible type, and frequent examinations, both preshift and onshift, are made to determine methane concentrations. The present bill requires examinations for methane onshift at least once each coal producing shift, at the start of each coal producing shift before electrical equipment is energized, at least every 20 minutes during a shift when electrically operated equipment is energized, before intentional roof falls are made, before explosives are fired, and before welding is done. When, on examination, methane concentrations exceed 1 volume per centum, changes must be made in the ventilation to reduce the methane content. When

(Footnote continued on following page)

properly monitored, was given by Clemons as his reason for ordering the seizure of the records:

> Q. Now, do you recall giving any instructions to anyone about any Fire Boss books of the company?
>
> A. Sometime on the night of March 9th, I think—can't remember exactly—it was around 9:00 o'clock, I told someone to confiscate the Fire Boss books.
>
> Q. Why did you tell someone to do that?
>
> A. By that time it was fairly well apparent to me that there was a good possibility of the disaster from the explosion and it was my feeling that there would be an extensive investigation and the Fire Boss books would be of value in the investigation.
>
> Q. What were the Fire Boss books or what are Fire Boss books?
>
> A. Fire Boss books is a book in which records of the examinations of the mine are kept. These examinations are required to be made before we get into a mine.
>
> Q. Why did you think they might be of some help in an investigation?
>
> A. In my mind at that time from the extent of the explosion and from where the—I was told by someone that the end of the track was, it was quite apparent there had been a large accumulation of methane on that section and if the section had been firebossed, I could

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(Footnote continued from preceding page)

the methane concentration exceeds 1.5 volume per centum, the electricity must be shut off in the section affected, and men withdrawn from the section until the methane content is reduced.

H. R. Rep. No. 91-563, 91st Cong., 1st Sess. 21, *reprinted* in [1969] U. S. Code Cong. & Admin. News 2503, 2524.

not understand how that large a volume of methane could have accumulated since the time it should have been firebossed.

Q. Whose duty is it, if anyone's duty, to keep and maintain the Fire Boss Books?

A. It's the company's responsibility to maintain the Fire Boss books.

* * *

Q. If it was a duty of the company to maintain the books and keep the books, why did you ask someone to take custody of the books?

A. To be sure that we had them available to look at and study and be sure none were misplaced or anything.

* * *

Although Clemons could not remember to whom he gave the particular instruction, Herman Lucas, a coal mine inspector for MESA, testified that he received the order and carried it out.

Lucas understood that the instruction included not only the Fire Boss book, but extended to the pre-shift books, on-shift books and electrical examination books. All of these books contained entries recording the result of inspections made by mine employees; all were required by the Coal Mine Health and Safety Act of 1969.[4]

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[4]There is a pre-shift and an on-shift book for each working section of the mine containing information about hazardous conditions, including methane concentrations, 30 U.S.C. § 863(d)(1). Similar records are kept for the "bore hole," an area where rock loading takes place and for "new returns," an area in which the coal is not currently being mined. In addition, there are two books which cover the entire mine area. One book reports on examination of emergency escapeways and the other reports the result of weekly examinations for hazardous methane conditions. Electrical records are also kept for each section of the mine.

In carrying out Clemons' order, Lucas seized and removed a total of 20 books from the mine office and electrical shop on the mine premises. These included six pre-shift and on-shift books, the "bore hole" and "new return" books, the Fire Boss book, the two weekly books and electrical examination books from nine areas of the mine.

Lucas first proceeded to the mine office where all the books, except for the electrical records, were kept. The mine offices were located approximately 100 yards from the mine which contained the Imboden Seam, the site of the accident. Jasper K. Cornett, Vice President of Operations for Blue Diamond and Scotia, testified concerning the location of the records within the office:

> Q. Where were the books in active use, that were in the process of being filled; where were they actually kept?
>
> A. Well, for the most part, there was a table in the Mine Office like a conference table that the various foremen came, either when they were preparing to go on the shift or when they came off, they sat down and made out their various records, their time sheets, their inspection reports, these things. They sat around this table and made out—filled out their books and they left them lying there on that table. They were available for the other people that came in or out.
>
> Q. Did a MESA inspector regularly make use of these books and examine them?
>
> A. Yes; whatever occasion they were there for, they also included examination of the books as part of their inspection of the mine.
>
> Q. Was there any restriction made upon them when they could look at the books?
>
> A. No, sir; they were available at all times.

A second shift mine foreman, Bruce Jones, testified that he was present when Lucas entered the office between 5:00 and 6:00 P.M. that afternoon. Jones stated that "quite a few" people were in the office at that time. Upon leaving, Lucas inquired where the electrical records were kept. He then went to the electrical shop and was provided the records maintained at that location after making a demand for them. Finally, he asked David Adams, a maintenance foreman, if he desired a receipt for the records, including those taken from the mine office.

It is undisputed that after the records were seized, no MESA official examined them or intended to do so at any time during the rescue operation, which lasted until March 11. Although Clemons denies giving any such order, the books were locked in a government vehicle by Robert Fleming, a coal mine inspector, during the late evening or early morning of March 9 or 10. Fleming turned the books over to MESA's Whitesburg, Kentucky office on March 11. The record shows that the coal company repeatedly asked for the records to be returned, but did not receive an inventory until several weeks later.

II.

On June 25, 1979, a grand jury in the United States District Court for the Eastern District of Kentucky returned an indictment charging the appellee mine companies with four counts of willfully violating a mandatory safety standard in the operation of a coal mine, in violation of 30 U.S.C. §§ 819, 863 and 877. The mine companies were also charged with two counts of making false statements in records required to be maintained by the mine operator, in violation of 30 U.S.C. § 819.

In advance of the trial, the defendants moved to suppress the records which had been seized by the federal mine

inspection officials from the mine premises. Following an evidentiary hearing, the district court granted the motion and in a memorandum opinion held that the seizure of the records violated the defendants' rights under the Search and Seizure Clause of the Fourth Amendment. In suppressing the evidence and ordering its return to the coal companies, the district judge held that there was not, in the first instance, any "search" within the meaning of that term under the Constitution since "there is no evidence suggesting any general exploration or rummaging through other papers or belongings. *Coolidge* v. *New Hampshire,* 403 U. S. 443; 467 (1971). To have a search within the meaning of the Fourth Amendment, it is necessary to have a factual predicate which reveals a looking, an exploration or quest for that which is not in plain view." (Citations omitted).

Nevertheless the district judge held that "[w]hat did occur within the consideration of the Fourth Amendment at the Scotia mine buildings was a seizure. The federal agent had no warrant." Although recognizing that the defendants were engaged in a closely and pervasively regulated industry, the trial court held that [t]he mere fact of a lessened expectation of privacy does not vacate the protection of the Fourth Amendment against unreasonable seizure," relying upon our circuit's decision in *United States* v. *Consolidation Coal Co.,* 560 F. 2d 214, 217 (6th Cir. 1977), *vacated and remanded* 436 U. S. 942 (1978), *judgment reinstated* 579 F. 2d 1011 (6th Cir. 1978), *cert. denied,* 439 U. S. 1069 (1979):

> Even where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course, no precedent sanctions direct access to the records without demand in the absence of a search warrant.

The trial court also expressly held upon the facts before it that there had been no consent by mine company officials to the seizure of the records, and that notwithstanding the presence of emergency conditions related to the rescue of the missing miners, "the seizure of the records here was 'detached' from the exigent circumstance of the rescue crisis for, in fact, the seizure had no bearing on the rescue operations." Under such circumstances, therefore, "the government has failed to establish by evidence any viable ground for not adhering to the established procedures for securing the documents it deemed important; in this instance it is the procedural defect which dictates the conclusion that the seizure of the Scotia records was impermissible."

III.

A.

The coal mining industry is subject to pervasive regulation by federal statute. The congressionally expressed purpose of the Coal Mine Health and Safety Act of 1969 is the protection of the health and safety of the coal miner as well as the improvement of working conditions and practices in the coal mines. 30 U.S.C. § 801.

To effectuate these purposes, Congress has promulgated numerous health and safety standards within the Act. An essential part of the legislation provides for routine examination and testing of conditions within the coal mines by the miners themselves to monitor compliance with the health and safety standards and to discover any other hazardous conditions. The results of these examinations must be recorded in books approved by the Secretary. These record books, with the sole exception of the electrical inspection reports, are to be maintained "in an area on the surface of the mine chosen by the mine operator to mini-

mize the danger of destruction by fire or other hazard, and the record shall be open for inspection by interested persons." 30 U.S.C. § 863(d)(1), (f), (g), (w). The electrical reports are required to be maintained for inspection by mine employees and the MESA representative. 30 U.S.C. § 865(g).

Congress has also provided for inspections and investigations of coal mines by the Secretary or its representative (MESA). These inspections and investigations may be for any of four purposes:

> (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines,
>
> (2) gathering information with respect to mandatory health or safety standards,
>
> (3) determining whether an imminent danger exists, or
>
> (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter.
>
> 30 U.S.C. § 813(a).

Notice to the coal mine operator is not allowed for inspections coming within the third or fourth clause of this section.[5] The government is given a "right of entry to,

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[5]Congress, in the legislative history to the 1977 Act, maintained the same structure concerning notice for inspections and investigations:

> Indeed, in view of the notorious ease with which many safety or health hazards may be concealed if advance warning of

(Footnote continued on following page)

upon, or through any coal mine" to make any such inspection or investigation. 30 U.S.C. § 813(b)(1). This has been interpreted as creating an exception to the warrant requirement of the Fourth Amendment.[6]

The Act also contains procedures applicable to accidents. Thus, when a mining accident occurs, the operator is required to take measures to prevent the destruction of evidence which would assist in investigating its causes. 30 U.S.C. § 813(e). For its part, the government is entitled to take any action necessary to protect lives and is given a discretionary right to direct rescue and recovery operations. 30 U.S.C. § 813(e). The operator must investigate the cause of an accident and make records of such investi-

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(Footnote continued from preceding page)

> inspection is obtained, a warrant requirement would seriously undercut this Act's objectives.
>
> The Committee has specifically adopted the prohibition on advance notice of inspections which is currently the rule under the Coal Act . . .

S. Rep. 95-181, 95th Cong., 1st Sess. 27, *reprinted* in [1977] U. S. Code Cong. & Admin. News, 3401, 3427. The 1977 Act specifically provides that notice is optional for inspections coming within the terms of clause 1 and 2 of the 1969 Act. 30 U.S.C. § 813 [1977 Act].

[6]Although the right of entry set forth in 30 U.S.C. § 813(b)(1) makes no mention of the need for a warrant, the provision has consistently been interpreted as creating an exception to the Fourth Amendment warrant requirement. The legislative history to the 1977 Act specifically states there is no need for a warrant and approves the decision of a three-judge panel in *Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973), holding the provision of the 1969 Act constitutional. S. Rep. No. 95-181, *supra*. The Supreme Court recently noted that Section 103(a) of the 1977 Act, 30 U.S.C. § 813(a), authorizes "a general program of warrantless inspections." *Donovan* v. *Dewey*, 101 S. Ct. 2534, 2541 (1981).

gation open for inspection by interested persons. 30 U.S.C. § 821(a). The government may subpoena witnesses and relevant papers, books, and documents for the purpose of holding a public hearing to make an investigation of the accident. 30 U.S.C. § 813(d).

Finally, the Act gives the government the power to obtain a permanent or temporary injunction, restraining order, or other appropriate order from a United States District Court if the operator fails to cooperate with the Secretary or its representative. Examples of such conduct are failure to admit representatives to the mine, refusal to permit inspection, or refusal to permit access to or the copying of records. 30 U.S.C. § 818(c), (d), (f).

B.

Courts have consistently upheld the constitutionality of the warrantless provision of the mining acts although the Supreme Court has held that such exceptions are limited to "relatively unique circumstances" involving industries with a history of close government regulation.[7] *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 313 (1978). The Supreme Court has recently held that the general program of warrantless inspections authorized by Section 103(a) of the 1977 Act, 30 U.S.C. § 813(a), does not violate the Fourth Amendment.[8] *Donovan* v. *Dewey*, 101 S. Ct. 2534 (1981). In *Donovan*, the Supreme Court noted:

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[7]The Supreme Court approvingly noted the provisions of the mine act which envision resort to a federal court when entry is refused by a mine operator. *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 321-22 n.18 (1978).

[8]The warrantless inspection procedure of the 1977 Act only differs from the 1969 Act in that it specifically allows a representative of the mine operator to accompany an MSHA official during an inspection.

> [Our past] decisions make clear that a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.

101 S. Ct. at 2539. Applying these principles, the Court found first that Congress reasonably determined that warrantless searches are necessary to further the substantial federal interest in mine safety:

> [I]t is undisputed that there is a substantial federal interest in improving the health and safety conditions in the Nation's underground and surface mines. In enacting the statute, Congress was plainly aware that the mining industry is among the most hazardous in the country and that the poor health and safety record of this industry has significant deleterious effects on interstate commerce. Nor is it seriously contested that Congress in this case could reasonably determine . . . that a system of warrantless inspections was necessary "if the law is to be properly enforced and inspection made effective." *United States* v. *Biswell*, 406 U. S., at 316, 92 S. Ct. at 1596. In designing an inspection program, Congress expressly recognized that a warrant requirement could significantly frustrate effective enforcement of the Act.

Id. at 2539-40. Next the Court reviewed the inspection provisions of the Act and held that "the regulation of mines it imposes is sufficiently pervasive and defined that the owner of a [mining facility] cannot help but be aware that he 'will

be subject to effective inspection'." *Id.* at 2540. Finally, the Court noted:

> [T]he Act provides a specific mechanism for accommodating any special privacy concern that a specific mine operator might have. The Act prohibits forcible entries, and instead requires the Secretary, when refused entry onto a mining facility, to file a civil action in federal court to obtain an injunction against future refusals. 30 U.S.C. § 818(a) (1976 ed., Supp. III). This proceeding provides an adequate forum for the mine owner to show that a specific search is outside the federal regulatory authority, or to seek from the District Court an order accommodating any unusual privacy interests that the mine owner might have.
>
> Under these circumstances, it is difficult to see what additional protection a warrant requirement would provide.

Id. at 2541 (citations omitted).

IV.

The district court ruled there was no search within the meaning of the Fourth Amendment because inspector Lucas did not rummage once he was within the mine office. The entry into the office, however, is itself a search for purposes of the Fourth Amendment. *See Youghiogheny and Ohio Coal Co.* v. *Morton,* 364 F. Supp. 45, 48 (S.D. Ohio 1973); *United States* v. *Consolidation Coal, supra,* 560 F. 2d at 214, 219.

The district court was correct in holding that Lucas conducted no search once within the mine office. MESA officials, according to Jasper Cornett, the vice president of the coal companies, regularly made use of the books kept on the table inside the mine office. The records were open

for inspection at all times. MESA officials had never been denied access to them. Moreover, the entry was made at a reasonable time, during a regular mining shift when people were on the premises. There is no evidence that Lucas intruded into any area other than where these books were kept and to which MESA had access. Lucas did not enter for the purpose of inspecting private areas within the mine offices.

The coal companies do not challenge the authority of Lucas to enter the mine offices under normal investigatory procedures. They argue, however, that this particular entry was unlawful because of the intruding mine inspector's ulterior motive. The acquiescence of the operator to the normal investigating entry may be explained by its submission to lawful authority provided in the Coal Mine Health and Safety Act of 1969. 30 U.S.C. § 813(b). Entry to the mine offices at reasonable times and in a reasonable manner is itself legal. *United States* v. *Consolidation Coal, supra.* There cannot be, however, any rummaging or further intrusion once within the office, *Marshall* v. *Nolichuckey Sand,* 606 F. 2d 693 (6th Cir. 1979).

We need not adopt here a mode of analysis by which the constitutionality of the inspector's entrance into the mine office is to be judged by his purpose for entry. The inspector did not carry on an offensive search. He entered the mine office during reasonable hours and went only to areas where the records were maintained in part for MESA inspection. It was an entry to which the mine operator had always consented.

Our inquiry therefore narrows to whether the seizure of the records violates the Fourth Amendment.

V.

Any inquiry into the validity of the seizure of the records must begin with the general rule that warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment. *Katz* v. *United States,* 389 U. S. 347, 357 (1967); *Camera* v. *Municipal Court,* 387 U. S. 523 (1967). The Warrant Clause of the Fourth Amendment protects commercial dwellings as well as private homes. *Marshall* v. *Barlow's, Inc., supra.* The purpose behind the warrant requirement is to insure that the judgment of a neutral and detached magistrate is imposed against the unbridled discretion of an official caught up in the heat of an investigation. *Johnson* v. *United States,* 433 U. S. 1 (1976).

A.

The government argues with great force that because the Coal Mine Health and Safety Act of 1969 specifically required the operator to maintain the seized records and keep them open to inspection, there is no expectation of privacy which justifies their suppression.

We cannot agree that these records are of interest or importance only to the government. It is not uncommon for records required by statute to serve multiple purposes. They may be used in the day-to-day operation of the coal mine. It is important for management to know the physical conditions within the mine. The miners also clearly benefit from having the records present at the mine site. Without them, the miner loses the protection afforded by knowing the location of dangerous areas within a mine. The records provide a medium whereby different shifts of miners may communicate with each other concerning mine conditions. The records may also be of use when a dangerous condition

or accident increases the peril of mining coal, in locating the cause of the condition, or perhaps in determining its scope, thereby indicating how much of the mine may continue in operation.

The Coal Mine Health and Safety Act itself indicates that the coal mine operator has at least some interest in having the record books on its premises. The Act gives the Secretary authority to obtain a district court order should the operator fail to give the Secretary access to the records or allow them to be copied. 30 U.S.C. § 818(f). Thus there exists a statutory remedy where access to the records is refused. This provision has been interpreted as one of the elements of the Act which preserve its constitutionality after *Marshall* v. *Barlow's, supra,* specifically because it provides the opportunity for the protection of privacy expectations. *Marshall* v. *Nolichuckey Sand, supra. Marshall* v. *Texoline, supra; Marshall* v. *Stoudt's Ferry Preparation Co., supra.*[9]

The Act also allocates the burden of investigating accidents upon the operator of the coal mine.[10] 30 U.S.C. § 821. If the companies may be deprived of the records necessary for such investigation, they will not be able to

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[9]The district court in *Marshall* v. *Stoudt's Ferry Preparation Co.*, 602 F. 2d 589, 594 (6th Cir. 1979), imposed a requirement of confidentiality on the search. The court explained that the purpose of allowing refusal of official entry followed by a court determination of the interests involved is to protect any unusual expectations of privacy.

[10]Although the Secretary is given the power to subpoena documents to investigate an accident, this power has been explicitly limited to investigations in connection with public hearings. *United States* v. *Consolidation Coal Co.*, 560 F. 2d 214, 219 n.10 (6th Cir. 1977), *vacated and remanded*, 436 U. S. 942 (1978), *judgment reinstated*, 579 F. 2d 1011 (6th Cir. 1978), *cert. denied*, 439 U. S. 1069 (1979).

comply with their statutory responsibility. The importance of the investigation of accidents may be gleaned from an examination of the legislative history of the 1977 Act:

> Such investigations shall be made and records kept whether or not the accident results in injury or death. Every accident must be investigated by an operator both to determine its cause and to ascertain the means to prevent recurrence. This provision reasserts the Committee's view that the primary responsibility for mine safety and health is the operator's and requires the operator to maintain a continuing program for mine safety and health. Such accidents may forewarn mine operators of potential hazards, and they should thus be investigated, and remedial action should be taken regardless of whether actual injuries occurred.

S. Rep. 95-181, 95th Cong., 1st Sess. 29, *reprinted* in [1977] U. S. Code Cong. and Admin. News, 3401, 3428.

In addition, the Act provides that the records shall be open for inspection by "interested persons," 30 U.S.C. § 863(d)(1), (f), (g), (w). Congress intended this term to encompass not only those associated with the mine, but to include the public. H.R. Rep. No. 91-563, 91st Cong., 1st Sess., reprinted in [1969] U. S. Code Cong. and Admin. News, 2503, 2544. This interest is adversely affected by allowing the warrantless seizure of records from the mine offices.

Further, the records kept by the mine company are not public property. Unlike the public gas rationing coupons involved in *Davis* v. *United States*, 328 U. S. 582 (1945), the records of conditions in the coal mine were created by the efforts of the employees. The coal companies were not acting as custodian for public property. Rather they were creating private property subject to inspection by the public. The coal companies create the records, furnish the

materials on which they are kept, and possess them on their realty for use in business.

B.

This panoply of interests leads us to conclude that it was not proper for the mine inspector to have removed the records in the absence of specific consent or an administrative warrant authorizing such action. We do not feel, however, that the operator's interest in the records requires their suppression, particularly in light of the statutory regulation which applies to the coal mining industry.

Although warrantless searches and seizures are *per se* unreasonable under the Fourth Amendment, *Katz* v. *United States, supra,* Justice Stewart explained:

> [F]or the Fourth Amendment protects people, not places. *What a person knowingly exposes to the public, even in his own* home or *office, is not a subject of Fourth Amendment protection.* See Lewis v. United States, 385 U. S. 206, 210; United States v. Lee, 274 U. S. 559, 563. But what he seeks to preserve as private even in an area accessible to the public, may be constitutionally protected.

Id. at 351-52 (emphasis added). The coal operator knowingly exposes the records to public scrutiny. They are open for inspection not only by the regulatory agency, but by interested persons, a term Congress intended to broadly include the public at large. H. Rep. No. 91-563. The operator in this case does not even pretend that it intended to preserve the contents of the record books as private. They were kept on a table in an area of the mine office

where they could be viewed by persons "who came in or out."[11]

It is true that under the statutory scheme, the interest which the mine operator has in the records and which was disturbed here is more akin to a property or a possessory interest, an interest which the Supreme Court has held is not necessarily sufficient to create a legitimate expectation of privacy. *Rakas* v. *Illinois*, 439 U. S. 128, 143 (1978); *United States* v. *Salvucci*, 448 U. S. 83, 91-92 (1980). At the same time we are reluctant to hold that the interest is possessory alone in view of the other values which attach to the use and maintenance of the records at the coal mine office. Nevertheless, however that interest may be described, it is a substantially diminished interest in view of the rights which the statute creates in the public and in the government. It is this consideration which leads us to conclude that even if such an interest is not entirely without Fourth Amendment protection, the remedy of suppression through use of the exclusionary rule is not appropriate.[12]

In conclusion, there was no unconstitutional search conducted by the MESA inspector in reaching the records. There was a seizure of property by an inspector who had broad access to it in a closely regulated industry. Since the interest which the coal companies have in the records is not

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[11]We do not decide what result would follow if the records were open only for inspection by the regulatory agency. We deal only with the situation of a pervasively regulated industry where the statutorily required records are open for inspection both by the regulatory agency and the public.

[12]In so ruling, we do not, therefore, address the equally difficult question of remedy should the government, after having returned the documents pursuant to the district court's order, have subsequently obtained possession once more through use of an otherwise valid administrative search warrant.

at the core of Fourth Amendment protection, we find that their suppression is not justified, absent an offensive search leading to their seizure.[13]

Accordingly, the judgment of the district court is reversed.

JUDGE WISEMAN, CONCURRING IN THE RESULT.

I concur in the result reached by Judge Engel that the fourth amendment does not require suppression of the mining records, and the consequent reversal of the district court. I would go further and hold, however, that the government's seizure of these open records implicated no privacy interests protected by the fourth amendment. I disagree with Judge Engel's holding that defendants' interest in maintaining control of these records was entitled to a measure of fourth amendment protection, despite the lack of a legitimate expectation of privacy in regard to the contents of the books. The seizures interfered only with defendants' possession of the records, an interest unprotected by the fourth amendment. *See United States* v. *Salvucci*, 448 U. S. 93, 91-92, 65 L. Ed. 2d 619, 628 (1980).

I think it should be emphasized that the Court's disposition of this case is in no way authority for the view that government agents are entitled to cart off a company's property whenever they are lawfully on business premises, even when that property is maintained for governmental inspection. Most importantly, the fifth amendment protects ownership interests through its prohibition against deprivations of property without due process. In cases of due

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[13]Since we decided that a warrant was not necessary in this case, we need not reach the government's arguments that circumstances surrounding the seizure brought it within one of the exceptions to the warrant requirement. However, we agree with the district court that exigent circumstances did not justify the seizure of the records. We also do not find clearly erroneous the finding that the coal mine operator did not consent to the seizure.

process violations, government agents could be liable for damages in a *Bivens*-type civil action, even though the seized evidence would be admissible in a criminal case. *Cf. G. M. Leasing Corp.* v. *United States,* 429 U. S. 338, 352 n.18 (1977) (observing that tax seizure cases center upon the due process clause of the fifth amendment, not the fourth amendment). Government agents who might view the Court's holding as general authority for random seizures of personal property that might be susceptible to warrantless inspections do so at their own peril.

Judge Engel's opinion implicitly recognizes that this case is not controlled by this circuit's decision in *United States* v. *Consolidation Coal Co.,* 560 F. 2d 214 (6th Cir. 1977), *vacated and remanded,* 436 U. S. 942 (1978), *judgment reinstated,* 579 F. 2d 1011 (6th Cir. 1978), *cert. denied,* 439 U. S. 1069 (1979). I find it necessary to address the case more fully, however, because of the district court's reliance on *Consolidation Coal* and because that case figured prominently in the briefs and oral arguments on this appeal. In my opinion, neither today's decision nor the Supreme Court's ruling in *Donovan* v. *Dewey,* 69 L. Ed. 2d 262 (1981), affects the actual holdings of *Consolidation Coal;* however, in light of *Donovan* and today's decision, it is apparent that certain dicta in that case no longer reflect accurately the current state of the law.[1]

The Court held in *Consolidation Coal* that the government needed administrative search warrants to search six

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[1]This is particularly true of the following statement, which the district court quoted in its memorandum opinion:

> Even where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course, no precedent sanctions direct access to the records without demand in the absence of a search warrant.

560 F. 2d at 217.

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560 F. 2d at 217.

mine offices for evidence that the defendant coal company had been submitting artificially "clean" dust samples to the monitoring agency. (These samplings were required by 30 U.S.C. § 842(a)). The searches at issue in *Consolidation Coal* required warrants because the government agents invaded areas where the operator had a "general expectation of privacy." *See Marshall* v. *Nolichuckey Sand Co.*, 606 F. 2d 693, 696 (6th Cir. 1979), *cert. denied*, 446 U. S. 908 (1980). Judge Celebrezze acknowledged that the investigators had the right to make warrantless entries, 560 F. 2d at 219; however, the scope of the intrusions in *Consolidation Coal* was not limited to particular areas where government agents and other members of the public routinely enjoyed free access for the purpose of record inspection. The searches extended "to locales where pertinent records and dust sampling cassettes might be stored," 560 F. 2d at 220, a scope which was not narrowly limited. In contrast, the searches in this case were limited to areas that government agents routinely entered; these were not intrusions into areas where defendants had a general expectation of privacy, as the district court found.

Equally significant is the nature of the items seized in the respective cases. The agents in *Consolidation Coal* sought "evidentiary indicia of compliance" with section 202 of the Act, 30 U.S.C. § 842. Section 842(a) required the transmittal of dust samples to the monitoring agency, but it did not require operators to make records of any sort available for inspection on the premises. This necessarily means that the items seized in *Consolidation Coal*[2] were not records maintained in compliance with the Act, and thus the defendant retained a significant expectation of privacy

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[2]The government seized a substantial volume of records and documents, a number of metal file cabinets and file card drawers, as well as several sampling cassettes. 560 F. 2d at 216 n.5.

as to their contents. On the other hand, all the books seized in the instant case were maintained for public inspection, as required by statute. 30 U.S.C. § 863(d)(1), (f) (g), (w). Consequently, defendants in the instant case had no expectation of privacy in regard to the contents of the records seized. *Cf. United States* v. *Miller,* 425 U. S. 435, 443 (1976) (individual has no expectation of privacy in regard to his banking records). As Judge Celebrezze recognized, there is "virtually no expectation of privacy in records" maintained in compliance with the Act. 560 F. 2d at 220-21.

Although Consolidation Coal Co. was engaged in a closely regulated business, the searches in that case required warrants because the governmental action impinged upon privacy interests that the company still retained, despite its pervasive regulation. *Consolidation Coal* is fully consistent with *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307, 313-14 (1978), as this Court found in its response to the Supreme Court's remand for reconsideration in light of that case. *United States* v. *Consolidation Coal Co.,* 579 F. 2d 1011 (6th Cir. 1978). It is also consistent with the Supreme Court's *Donovan* decision. The entries in the instant case required no warrant, however, because defendants had no general expectation of privacy in either the premises entered or the records sought.

Warrants are necessary to check the "unbridled discretion" of government agents as to when, where, and whom to search. *See Marshall* v. *Barlow's, Inc., supra,* 436 U. S. at 323. That discretion was sufficiently limited in this case, because the agents were only authorized to search for records maintained for MESA inspection in areas freely accessible to MESA agents and other members of the public. Having achieved access to those records, their seizure infringed upon no additional privacy interests. To quote from *Donovan* v. *Dewey, supra,* "[u]nder these cir-

cumstances, it is difficult to see what additional protection a warrant requirement would provide." 69 L. Ed. 2d at 273. To require a warrant in these circumstances would dilute the importance of warrants in other factual settings where the scrutiny of a neutral magistrate serves to protect important civil liberties. *See* 1 W. LaFave, Search and Seizure § 2.1(e) (1978).

KEITH, Circuit Judge, dissenting. I cannot agree with either Judge Engel's or Judge Wiseman's analysis, therefore I respectfully dissent.

I.

Judge Wiseman concludes that the Coal Mine Health and Safety Act of 1969 ("Act"), 30 U.S.C. § 863, eliminated any expectation of privacy Blue Diamond Coal Company ("Blue Diamond") had in its records. I agree with Judge Engel that this position is incorrect. The Act does authorize inspection of the records by the Mine Enforcement and Safety Administration ("MESA") inspectors, but the remedy provided by the Act in case of noncompliance is federal district court action. 30 U.S.C. § 818(f). If the inspectors had a reasonable fear that Blue Diamond would destroy or falsify the records in order to cover up mine safety violations, the proper remedy would be court action. However, in the instant case, the federal investigators resorted to self-help.

II.

Judge Engel's position is that the Act so diminished Blue Diamond's interest in controlling its records "that even if such an interest is not entirely without Fourth Amendment protection, the remedy of suppression through use of the exclusionary rule is not appropriate." I disagree. The remedy of suppression through the use of

the exclusionary rule is mandatory and in accordance with standard search and seizure analysis. The search of Blue Diamond's records was beyond the scope of the consent imposed by the Act.

Even for purely administrative inspections, entry by government officials onto private property for inspection purposes ordinarily requires issuance of a warrant. *See* v. *City of Seattle,* 387 U. S. 541, 545 (1967); *Camara* v. *Municipal Court,* 387 U. S. 523, 534 (1967). In *Colonnade Catering Corp.* v. *United States,* 397 U. S. 72, 77 (1970), the Supreme Court explained: "where Congress authorized inspection but made no rules governing the procedure that inspectors must follow the Fourth Amendment and its various restrictive rules apply." Therefore, prior to the Act, Blue Diamond had a legitimate expectation of privacy, both in their offices and in the contents of the record books. Clearly, it would have been a Fourth Amendment violation for MESA agents to enter Blue Diamond's offices without a warrant, open their record books, and search through their contents. However, the Act, a comprehensive regulatory statute, limited the scope of Blue Diamond's expectations of privacy and enabled MESA agents to make certain inspections of records and books which would otherwise violate the Fourth Amendment. See *Donovan* v. *Dewey,* ____ U. S. ____, 101 S. Ct. 2534 (1981).

The Act authorizes warrantless inspections of certain record books of mine operators. Pursuant to the procedures articulated in the Act, government agents have the "right to entry to, upon, or through any coal mine" to make certain inspections or investigations. 30 U.S.C. § 813(b)(1). The mine conditions and health and safety standards compliance record books are also subject to inspection. 30 U.S.C. § 863(d)(1), (f), (g), (w). The record books must be "maintained in an area on the surface of the mine chosen by the mine operator to minimize the danger of destruction

by fire or other hazard." *Id.* The Act does not, however, authorize the government to take possession of the record books, compliance data, or any other private property of the operator. In fact, only a subpoena authorizes the government to physically take possession of the records absent a search warrant. 30 U.S.C. § 813(d). The government's right of possession does not vest until a public hearing has been called to investigate a mining accident. *Id.*

The search provisions of the Act are an exemption to the warrant requirement of the Fourth Amendment. Searches and inspections conducted pursuant to and in full compliance with the Act's congressionally articulated procedure are reasonable and are not Fourth Amendment violations. The Act's search procedures are carefully limited in time, place and scope. *See United States* v. *Biswell,* 406 U. S. 311, 315 (1972); *Donovan* v. *Dewey, supra.* These procedures allegedly provide "substantially the same assurances [as a warrant]." *United States* v. *Martinez-Fuerte,* 428 U. S. 543, 565 (1976). The rationale underlying this limited exemption is that businessmen involved in closely regulated industries such as mining, "accept the burdens as well as the benefits of their trade." *Marshall* v. *Barlow's, Inc.,* 436 U. S. 307, 313 (1978). "The businessman in regulated industry in effect *consents* to the restrictions placed upon him." *Id.* (Emphasis added).

This consent is merely a legal fiction imposed on the mining industry. The fictionalized consent in effect, and in reality, waives Fourth Amendment rights guaranteed in the text of the Constitution. The waiver or consent imposed by the Act, however, is a limited one. Mine operators, such as Blue Diamond, have only consented constructively to inspections and searches conducted in accordance with the Act. "[C]onsent searches are reasonable only if kept within the bounds of the actual consent." *United States* v. *Griffin,* 530 F. 2d 739, 744 (7th Cir. 1976). *See, e.g., Mason*

v. *Pulliam*, 557 F. 2d 426, 429 (5th Cir. 1977) ("when the basis for search or seizure is consent, the government must conform to the limitations placed upon the right granted to search, seize or retain the papers or effects."); *Oliver* v. *Bowens*, 386 F. 2d 688, 690 (9th Cir. 1967); *United States* v. *Dichiarinte*, 445 F. 2d 126, 129 (7th Cir. 1971). Searches which exceed the scope of consent violate the Fourth Amendment. *Id.*

The Act indicates that MESA inspectors may visually inspect, search through, and copy the operator's records while those records are at the mine site. The record books are the operator's private property. The Act does not empower the MESA inspectors to take the records from the mine site. Yet, all parties in this action admit that the MESA agents did precisely what the Act does not authorize them to do. MESA agents entered the operator's offices, illegally seized the record books, and transported them to the MESA offices in Whitesburg, Kentucky. At least two days after their initial seizure, MESA agents opened the various records and searched through their contents in the Whitesburg offices.

The fictional "consent" or waiver of Fourth Amendment rights imposed by the Act is limited to inspections and searches conducted at the mine site. The seizure and transportation of the record books from the mine site to Whitesburg exceeded the scope of the narrow exception to the Fourth Amendment that the Act created. Blue Diamond did not voluntarily consent to the taking or the subsequent search. The trial court specifically found that Blue Diamond had not consented to the search of the office or the seizure of the records. This finding is not clearly erroneous. Therefore, once the record books were seized and illegally transported from the mine site, Blue Diamond's expectations of privacy were violated. Blue Diamond unquestionably had a right to exclude everyone not at the

mine site from viewing the records first hand. The subsequent warrantless searching through the records which occurred in Whitesburg at least two days after the illegal seizure violated the Fourth Amendment.

Moreover, on these facts, there is simply no evidence that Blue Diamond would not accurately document its investigation of the accident. The report would have been made available to MESA officials. 30 U.S.C. § 813(d)(j). Significantly, there were other statutorily approved procedures MESA officials could have used to obtain Blue Diamond's records. 30 U.S.C. § 813(b). It is not advisable to sanction such blatant violations of Fourth Amendment rights as occurred in the instant case. Accordingly, I would affirm Judge Hermansdorfer's holding that the records obtained in violation of the Fourth Amendment was subject to the exclusionary rule.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Criminal Action No. 79-6

UNITED STATES OF AMERICA, - - - - *Plaintiff*,

v.

BLUE DIAMOND COAL COMPANY;
SCOTIA COAL COMPANY, - - - - *Defendants.*

MEMORANDUM OPINION—Filed February 19, 1980

The issue presently before the Court in this matter arises from the defendants', Blue Diamond Coal Company and Scotia Coal Company, motions to suppress as evidence all property seized from the Scotia mine offices at Oven Fork, Kentucky on March 9, 1976 on the ground that such entry and seizure by federal inspectors violated the Fourth Amendment rights of the defendants. There is agreement that the federal inspector who seized the records from Scotia's mine offices and electrical shop did not have a search warrant. It is equally clear the seizures were made without consent and were the result of a decision to preserve evidence for an anticipated investigation.

The United States argues, however, that the entry of the federal inspector into the buildings where the seized records were found is permitted by law, 30 U.S.C. §813a, and that such statutory right of entry into a coal mine has been judicially construed to include mine offices. *United States* v. *Consolidation Coal Co.*, 560 F. 2d 214, 219 (6th Cir. 1977), *vacated and remanded*, 436 U. S. 942 (1978), *judgment reinstated*, 579 F. 2d 1011 (1978). It is concluded that the defendants' rights were not violated by the

entry of the federal mine inspector into the buildings of Scotia complained of in this proceeding.

The defendants' argument that an unreasonable search ensued by the mine inspector's entry into Scotia's buildings must fail for the reason that the evidence does not disclose any circumstance which may be described as a "search". There is no evidence suggesting any general exploration or rummaging through other papers or belongings. *Coolidge* v. *New Hampshire,* 403 U. S. 443, 467 (1971). To have a search within the meaning of the Fourth Amendment it is necessary to have a factual predicate which reveals a looking, an exploration or quest for that which is not in plain view. *United States* v. *Haden,* 397 F. 2d 460, 465 (7th Cir.), *cert. denied,* 396 U. S. 1027 (1968); *Haerr* v. *United States,* 240 F. 2d 533, 535 (5th Cir. 1957); *Ker* v. *California,* 374 U. S. 23, 43 (1963); *United States* v. *Lee,* 274 U. S. 559 (1926).

What did occur within the consideration of the Fourth Amendment at the Scotia mine buildings was a seizure. The federal agent had no warrant. The Government argues that no search warrant was required because the documents taken were public documents—documents required to be maintained by law—and, therefore, no constitutional violation occurred with their taking. The Government's citing of *Wilson* v. *United States,* 221 U. S. 361, 380 (1911), and *Davis* v. *United States,* 328 U. S. 582, 589-90 (1946), provides the answer to this argument. These cases teach, not that public documents may be seized without a warrant, but rather that the custodian of public documents has no privilege to refuse the *production* of such documents even though they may be incriminating. Although it is clear that closely regulated industries may claim virtually no cognizable expectations in a constitutional sense in documents maintained in compliance with law or regulation, the mere fact of a lessened expectation of privacy does not

vacate the protection of the Fourth Amendment against unreasonable seizures. Indeed, as the Sixth Circuit noted in the *Consolidation* opinion, *supra*, at 217,

> "Even where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course, no precedent sanctions direct access to the records without demand in the absence of a search warrant."

The Fourth Amendment prohibition against unreasonable searches is shaped by the warrant clause, *Cady* v. *Dombrowski*, 413 U. S. 433 (1973), and it must be taken as settled law that any seizure is *per se* unreasonable without the lawful process embodied in the securing of a search warrant, except for a few and carefully guarded exceptions. See, *Almeida-Sanchez* v. *United States*, 413 U. S. 266 (1973); *Chimel* v. *California*, 395 U. S. 752; *Warden* v. *Hayden*, 387 U. S. 294 (1967); *Carroll* v. *United States*, 267 U. S. 132 (1925); and, *Schmerber* v. *California*, 384 U. S. 757 (1966). The basic test for whether exigent circumstances exist, the underlying basis for the exception to the Amendment's proscription, as set forth in *Blanton* v. *United States*, 520 F. 2d 907, 912 (6th Cir. 1975), is "whether it is not practical to secure a warrant." The determination of this question requires a weighing and sifting of evidence.

At approximately 11:30 A.M. on March 9, 1976 there was an underground explosion at the Scotia mine near Oven Fork, Kentucky. Mine Enforcement and Safety Administration (MESA) personnel began arriving at the mine site about 1:30 P.M. and at approximately 3:00 P.M. Mr. Bill Clemons, assistant district manager for MESA, arrived and assumed the direction of all rescue operations. Some fifteen miners were missing and their fate was unknown.

All efforts at that time were focused on the rescue of any survivors or, if none, the retrieval of the miners' bodies.

According to his testimony, at about 9:00 P.M. on March 9, 1976, Mr. Clemons decided that there would eventually be an investigation of the explosion and directed a subordinate "to confiscate" certain records of the coal company. Mr. Clemons stated that the reason for his order was his concern that these records might be misplaced during the confusion and his knowledge that they would be required for the investigation. Mr. Lucas, who implemented the order to confiscate the records, testified that he went into the mine office, observed the records on a table and picked them up. He had to inquire as to the whereabouts of the electrical records and was advised by an unidentified person that such records were in the electrical shop. Mr. Lucas went to the electrical shop and was handed the records at his request. Mr. Lucas further testified that he did not examine the records but placed them in a government vehicle and later transported the documents to the district office. At that time there still had been no examination of these records by Mr. Lucas or by any of the other inspectors. No receipt or inventory of seized records was furnished to any representative of the mining company; however, an inventory was produced much later after the demand of defendants' counsel.

It stands undisputed that the seizure of the records was not related in any direct manner to the rescue of the missing coal miners. The only conclusion one can draw from the evidence is that the Government sought to preserve evidence for further purposes without making any showing that the records seized were in jeopardy of being destroyed, secreted or misplaced. Some nine and one-half hours lapsed between the estimated time of the explosion and the estimated time of the record seizure. At the time of seizure the records were in their normal locations and

no testimony appears even suggesting that the records would have been removed or otherwise dealt with than in the normal course of business. Had the evidence shown that the documents were examined to assist in determining the status underground prior to the explosion, to identify active working locations or to assist in any way the rescue operation, the seizure would have been permissible because a true exigent circumstance would have existed. The need for possible lifesaving action balanced against orthodox procedural requirements would justify, if not require, the finding that it would have been impractical to secure a search warrant. Absent such usage and upon evidence that the records were seized to aid in an investigation to follow the rescue operations, it was not impractical to secure a warrant no matter what the distances between Oven Fork, Kentucky and the several available United States Magistrates might have been, for the simple reason that no basis in fact existed justifying deviation from the applicable procedural rules for securing such documents at the time they were seized.

The Government's contrary view relies heavily upon *Michigan* v. *Tyler*, 436 U. S. 499 (1978). Reliance upon this case is misplaced but instructive to the issue at hand. In the *Michigan* fact situation firefighters answered an early morning alarm and proceeded to quench the fire. Hampered by smoke and darkness they reappeared the following morning at 8:00 A.M., examined containers which had been removed from the building the night before and recovered other items during an investigation of the building. Several weeks later a further examination of the building was made and more evidence uncovered. The holding validates upon an exigent circumstance rationale the seizing of the items removed during the fire and the following morning inspection. But, the items seized weeks later did not come within the prior exigent circumstance and

were found to have been impermissibly taken. In *Tyler* the fire constituted the exigent circumstance, a circumstance which continued throughout the firefighting activities and for a reasonable time thereafter. In the instant case the underground explosion might have created an exigent circumstance for some purposes but not for the seizing of documents. Applying the analysis used in *Tyler*, the seizure of the records here was "detached" from the exigent circumstance of the rescue crisis for, in fact, the seizure had no bearing on the rescue operations. *Tyler* is distinguishable on its facts but does teach that where applicable there are rational limits upon the suspension of the Fourth Amendment's strict requirements.

The issue presented turns upon the balancing of subtle considerations and warrants revisiting Mr. Justice Stewart's opinion in *Coolidge* v. *New Hampshire*, *supra* at 454, quoting Mr. Justice Bradley's admonition in *Boyd* v. *United States*, 116 U. S. 616, 635:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

This view does not depreciate the efforts of those charged by law with the investigation of mine accidents, but it re-

quires no less of them in that salutory effort than it requires of any law enforcement officer in the performance of his duties. In this instance the Government has failed to establish by evidence any viable ground for not adhering to the established procedures for securing the documents it deemed important; in this instance it is the procedural defect which dictates the conclusion that the seizure of the Scotia records was impermissible. The motions to suppress will be sustained.[1]

An order in conformity with this Memorandum Opinion will be filed herein this date.

This the 19 day of February, 1980.

(s) H. David Hermansdorfer, Judge

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[1]It is noted that the United States may appeal this ruling pursuant to 18 U.S.C. §3731 and the Government is encouraged to do so. For the purpose of expediting such an appeal, should it be undertaken, this Court certifies that this question involves a material issue which will impact heavily upon the evidence adduced at the trial and upon the length of such trial.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

Criminal Action No. 79-6

UNITED STATES OF AMERICA, - - - - *Plaintiff,*

v.

BLUE DIAMOND COAL COMPANY;
SCOTIA COAL COMPANY, - - - - *Defendants.*

ORDER—Filed February 19, 1980

In conformity with the Memorandum Opinion filed herein this date,

IT IS ORDERED HEREIN AS FOLLOWS:

(1) That defendants' motions to suppress shall be, and they hereby are, SUSTAINED.

(2) That plaintiff return to defendant Scotia forthwith all property seized from the mine office and electrical shop on March 9, 1976.

This the 19th day of February, 1980.

(s) H. David Hermansdorfer, Judge

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

80-5084

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant*

v.

BLUE DIAMOND COAL COMPANY;
SCOTIA COAL COMPANY, - - - *Defendants-Appellees*

Before: ENGEL and KEITH, Circuit Judges and WISEMAN, District Judge

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JUDGMENT

APPEAL from the United State District Court for the Eastern District of Kentucky.

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Kentucky and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of said District Court in this cause be and the same is hereby reversed.

No costs taxed.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

80-5084

UNITED STATES OF AMERICA, - - *Plaintiff-Appellant*

v.

BLUE DIAMOND COAL COMPANY;
SCOTIA COAL COMPANY, - - - *Defendants-Appellees*

ORDER—Filed February 8, 1982

Before: ENGEL and KEITH, Circuit Judges and WISEMAN, District Judge*

No judge in regular active service of the court having requested a vote on the suggestion for a rehearing en banc, the petition for rehearing filed herein has been referred to the panel which heard the original appeal.

Upon consideration of said petition, and the court finding no issues presented which have not been previously considered,

IT IS ORDERED that the petition for rehearing en banc is denied.

ENTERED BY ORDER OF THE COURT

(s) John P. Hehman
Clerk

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*Hon. Thomas A. Wiseman, Jr., Judge, United States District Court for the Middle District of Tennessee, sitting by designation.

Opposition

Office - Supreme Court, U.S.
FILED
MAY 7 1982
ALEXANDER L. STEVAS

No. 81-1870

In the Supreme Court of the United States

OCTOBER TERM, 1981

BLUE DIAMOND COAL COMPANY AND
SCOTIA COAL COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-1870

BLUE DIAMOND COAL COMPANY AND
SCOTIA COAL COMPANY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that statutorily required records seized from the office of a coal company should be suppressed as evidence.

Petitioners, a mine company and its parent company, were charged in an indictment returned in the United States District Court for the Eastern District of Kentucky with four counts of willfully violating a mandatory safety standard in the operation of a coal mine, in violation of 30 U.S.C. 819, 863 and 877, and with two counts of making false statements in records required to be maintained by a mine operator, in violation of 30 U.S.C. 819. Following an evidentiary hearing, the district court suppressed as evidence statutorily required records seized by federal mine inspection officials from a mine operated by petitioners, following an underground explosion in the mine (Pet. App. 30a-37a). The records were required to be maintained and

kept for inspection by 30 U.S.C. 863(d)(1), (f), (g), (w) and 865(g). The court of appeals reversed, one judge dissenting, 667 F. 2d 510 (Pet. App. 1a-29a).

Petitioners contend (Pet. 11-26) that the warrantless seizure of the records was unlawful and that suppression of the records was an appropriate remedy. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress the records. If petitioners are acquitted following a trial on the merits, their contention will be moot. If, on the other hand, petitioners are convicted, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

MAY 1982

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[1]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

DOJ-1982-05